



State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices and Water Allocation Section

FROM: Norman C. Young *NCY*

DATE: September 6, 1984

RE: IN-STREAM STOCKWATERING

Application Processing No. 31

The Idaho Court of Appeals addressed the issue of in-stream stockwater rights in R.T. Nahas Co. v. Hulet, ___ Idaho ___, 674 P.2d 1036 (ct. App. 1983). In-stream stockwater use also has been recognized by the 1984 Legislature with the passage of S.B. 1236, codified at Section 42-113, Idaho Code.

In Nahas, the court held that, "[F]or the purpose of establishing the existence of a stock watering right by the constitutional method of appropriation, a diversion device is not required." The court further said, "This is not to say that the Department of Water Resources might not reasonably impose a requirement for the use of physical diversion or measuring devices. Such a requirement could serve a valid regulatory purpose by aiding the Department in determining the location and quantity of water use."

Section 42-113, Idaho Code, provides in pertinent part as follows:

A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock. In the consideration of applications for permits to appropriate water for other purposes, the director of the department of water resources shall impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use...

The Department's policy with respect to the filing of an application for in-stream livestock watering is similar to our policy for single-family domestic use of water from a groundwater source, except that there is no statutory limit on the amount of water which a person may beneficially use for in-stream livestock watering purposes. More specifically, an application may be filed or not filed depending upon the preference of the water user.

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Due to the many variables involved, general guidelines for the quantification of a reasonable amount of water to remain in a stream, either to protect prior downstream water rights for in-stream livestock use or to satisfy the needs of new permits for the in-stream watering of livestock, are difficult to establish. When it is necessary to determine the amount of water reasonably required for the in-stream watering of livestock, the Department will do so on a case-by-case basis.

With respect to the mandatory claims requirements of Section 42-242, et seq., Idaho Code, it is the Department's policy that in-stream stockwater use may be claimed after June 30, 1983 without being considered a late claim. Just as with the single-family domestic use of water from a groundwater source, the date of priority of an in-stream stockwater right established by beneficial use is the date of first beneficial use. Thus, unlike other claims for surface water, the priority date for an in-stream stockwater use can be after May 20, 1971. The filing of a claim under these statutes is at the option of the water user.

In-stream stockwater rights may exist in water systems which have previously been, or are in the process of being, adjudicated. With respect to future adjudication proceedings, an advance determination should be made by the district court as to whether in-stream stockwater rights shall be included or excluded from the adjudication. With respect to current adjudication proceedings, the issue of in-stream stockwater rights should be addressed in the Findings of Fact and Conclusions of Law.

Development of a water right based on out-of-stream watering of livestock is not affected by Section 42-113, Idaho Code. Therefore, the only way to develop a new water right for a system where there is a diversion from a surface water source is by filing an Application for Permit.